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No. 84-1168

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1984

JEROME J. NASH,
*Appellant,*
vs.
CITY OF SANTA MONICA, et al.,
*Appellees.*

**On Appeal From the Supreme Court of The State of California**

## REPLY BRIEF

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## REPLY BRIEF

Appellant Jerome J. Nash ("Nash") herein briefly responds to the Motion to Dismiss filed by Appellees Santa Monica Rent Control Board and City of Santa Monica (collectively referred to herein as "City").

### A.

### THE CITY'S MOTION MISSTATES THE ISSUES.

#### 1. This Is Not An Action Seeking Demolition Approval.

In its attempt to characterize this action as nothing more than a challenge to an ordinary local "land use" regulation, the City has erroneously contended that Nash is seeking to demolish his apartment building. That is not correct. Mr. Nash wishes to cease engaging in the landlord business in Santa Monica. Full relief in this

action could be accorded Nash by permitting him to evict the tenants and vacate the building. Whether the building would remain vacant or could then be demolished is not at issue in this litigation.

**2. The Constitutional Issues Raised Herein Are Important.**

The significance and practical importance of the constitutional issues raised by this case can be understood through consideration of the simple hypothetical of a town wherein (say) a Chrysler automobile assembly plant is located. In the face of a public concern that Chrysler will close the plant with the resulting loss of hundreds of local jobs, the town passes a law that the property upon which the assembly plant is located must at all times be used for the assembly of automobiles.

In response to a contention by Chrysler that it has the absolute right to close the plant, the town asserts that the preservation of its employment base serves a clear public purpose and that, in any event, Chrysler is not being forced to remain in business or to continue operating the plant, since it is always free to sell the plant to Toyota, Ford, or General Motors. Until Chrysler does find a buyer, however, it must continue to operate the plant. Just as in the present case, the town argues that the law is only one of local land use regulation, of little or no federal significance.

There is no distinction between the application of the Constitution to the hypothetical and to the instant case. If Chrysler's constitutional rights would be denied in the hypothetical, then Nash's constitutional rights are being denied in the instant case. Reading the City's Motion to Dismiss filed herein, one finds that the Motion could substitute equally well, line by line, citation by citation, argument by argument, as a motion to dismiss filed by the town in the hypothetical.

The federal significance and practical importance of the issue as illustrated by the hypothetical cannot be denied. The consequences would be obvious if local governments were allowed — under the guise of regulating land use pursuant to their local police power — to hold hostage businesses which offer local employment. These consequences cannot be said to be unimportant.

**3. The Constitutional Issues Are Unresolved.**

The thrust of the City's Motion to Dismiss is not so much a contention that the fundamental rights involved in this appeal are unimportant, but rather a contention that the legal issues raised in this appeal have already been resolved in previous cases, such as *Fresh Pond Shopping Center v. Callahan*, ____ U.S. ____, 104 S. Ct. 218 (1983); and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

As set forth in Nash's Jurisdictional Statement, none of the cases purportedly relied upon by the City dispose of — or even address — the issue raised in this case. The only time this Court had addressed the issue raised herein, the Court was appalled at the suggestion that a government might force a private owner to remain in business against his will. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965). Only by misstating the case as being one of demolition controls, can the City even colorably describe the issues raised in this action as being settled law.

**4. This Is Not A Historic Preservation Case.**

In its attempt to shoehorn this action into the general rubric of "local land use," the City references the historical preservation cases. In fact, the City even contends that consideration of this appeal would call "into question historic preservation legislation enacted by all 50 states and

by over 500 municipalities." The City's purported concern is unfounded. As set forth earlier, Mr. Nash is not seeking by this action to demolish his property which, incidentally, does not have the slightest historical or architectural importance.

Through its law, the City is not in any way attempting to preserve Mr. Nash's building. The building itself has no intrinsic value to the City and is not the real subject of this action. Rather, the real subject of this action is an attempt by the City, under the purported veil of "local land use," to compel Mr. Nash to engage in a certain business within the building. None of the land use cases cited by the City deal with this issue.

**5. Even Land Use Regulations May Be In Violation Of Personal Constitutional Liberties.**

Even if the instant case were to fall within the general rubric of "land use," it does not follow, *a fortiori,* that the regulation is a valid exercise of the local police power. Regulations enacted under the guise of land use can significantly violate personal rights guaranteed under the Constitution. If a local government enacts land use regulations to economically compel its citizens to forego their constitutional rights, then the regulations must be declared invalid, whether they are viewed as "land use" or otherwise. A government can as surely deprive its citizens of their constitutional rights by the threat of loss of their investments, as by the threat of incarceration.[1]

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[1]In the instant case, the threat is of both – Nash would be guilty of a misdemeanor if he ceased using his property for the residential rental business.

## B.

## THE CONSTITUTIONAL ISSUES ARE PROPERLY BEFORE THIS COURT.

In contending that this appeal should be dismissed on procedural grounds, the City misstates both the record and the nature of the grounds for dismissal.

### 1. Federal Constitutional Issues Are Involved And Were Timely Raised And Decided.

There are certainly federal constitutional rights at issue in this action. That fact was acknowledged by the California Supreme Court in its decision wherein it noted that the right to go out of business emanates from the Thirteenth Amendment of the United States Constitution.[2] J.S. at A-6.

Among its other contentions, the City argues that the trial court's decision was not based on any supposed liberty interest, thereby allegedly justifying dismissal of the action by this Court on the grounds that the constitutional issues were not timely raised and considered. The City is simply in error in this assertion. One of the stated and express grounds for the trial court's decision was

> Petitioner is constitutionally entitled not to be compelled to sell the Building as the only means of terminating his Business and removing himself and his property from under the Board's regulatory jurisdiction. J.S. at C-7.

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[2]Nash contends that such right is also guaranteed by the Fourteenth Amendment.

**2. Nash's Federal Rights Are Not Protected Under Independent State Grounds.**

The most interesting argument for dismissal raised by the City is that, since the California Supreme Court purportedly interprets the California Constitution more liberally than this Court interprets the United States Constitution,

> . . . it would be anomalous for this Court to find Nash's purported liberty interest protected by the Thirteenth Amendment after his claim based on the 'heightened' protections of the California Constitution has been rejected.

Motion to Dismiss, at p. 7, n. 6.

In other words, the City is arguing that this Court need not waste its time considering appeals from California since it is purportedly well-established that the federal constitutional rights of Californians are better protected by the California courts than by this Court.

## CONCLUSION

For the foregoing reasons, Nash respectfully requests that the Motion to Dismiss be denied and that this Court note probable jurisdiction.

Respectfully submitted,

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